81-2260

No. 81-2660

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JUL 1 1982
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

S.A.R.L. de GESTION PIERRE CARDIN,

Petitioner,

—*against*—

MARVIN W. MORSE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Should this Court review a decision which applied fundamental principles of New York law in determining that petitioner breached its contract with respondent and, therefore, was liable for resulting lost profits?

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BRIEF OF RESPONDENT IN OPPOSITION

PRELIMINARY STATEMENT

Respondent Marvin W. Morse ("Morse"), the plaintiff in this action, respectfully requests that the Court deny the petition of S.A.R.L. de Gestion Pierre Cardin ("SARL") for a writ of certiorari. No novel or important issue has been presented by SARL, SARL has raised no issue of national or federal importance, the law applied in this action is not in conflict with decisions of this Court or any other Circuit, and there has been no departure from the accepted and usual course of judicial proceedings which would warrant the exercise of the Court's supervisory powers.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York dated August 5, 1981 (Petition, B1-64) denied SARL's motion for a judgment notwithstanding the verdict or, in the alternative, for an order setting aside the verdict and granting a new trial.

In its opinion, the District Court held, inter alia, that:

(a) Whether Morse and SARL intended to enter into a contract pursuant to which Morse was licensed to sell "Pierre Cardin" cigarette lighters before executing a formal written contract presented a question of fact. Petition, B25-27.

(b) There was sufficient evidence to support the findings of the jury that Morse and SARL had reached

agreement with respect to all essential terms of their contract and intended to be bound before executing a formal written contract. Petition, B20-25.

(c) The conclusion of the jury that Morse (who sought $1,800,000 in damages) would have realized $435,000 in net profits from the sale of "Pierre Cardin" lighters if SARL had not breached the license agreement was based upon a reasonable estimate and was not the result of speculation or guesswork. Petition, B37-45.

The opinion of the United States Court of Appeals for the Second Circuit dated March 8, 1982 (Petition, pp. A1-6) affirmed the judgment of the District Court and specifically held, inter alia, that:

(a) Whether parties to a contract have agreed upon all

essential terms and intend to be bound in the absence of an executed written agreement present questions of fact for resolution by a jury. Petition, A2-3.

(b) There was sufficient evidence for the jury to conclude that Morse and SARL had agreed upon all essential terms of their contract and intended to be bound before executing a formal written agreement. Petition, A2-3.

(c) There was sufficient competent evidence to support the jury award of $435,000. Petition, A4.

COUNTER-STATEMENT OF THE CASE

Morse and SARL entered into a contract consisting of four letters which granted Morse, inter alia, the exclusive

right to sell "Pierre Cardin" cigarette lighters in the United States.

The contract was concluded after approximately six months of oral and written negotiations in France and the United States between Morse and Herve Duquesnoy, one of two SARL employees responsible for licensing "Pierre Cardin" products throughout the world.

Morse initially met with Duquesnoy on September 24, 1976. At that meeting, Morse detailed his merchandising plans for "Pierre Cardin" cigarette lighters and gave Duquesnoy a written outline summarizing the plans. Duquesnoy told Morse that the cigarette lighter license for the United States was available and requested a more formal proposal from Morse.

On October 5, 1976, Morse sent Duquesnoy additional details regarding his proposal. Duquesnoy responded on October

13, 1976 by advising Morse that:

> "I must insist on the fact that for the first three year period of the contract, Mr. Pierre CARDIN asks for minimum guaranteed royalties and a 10% rate to apply on turnovers [sales]."

Morse then wrote to Duquesnoy on November 26, 1976 requesting exclusivity with respect to the license:

> "Please let me know as we are prepared to negotiate the deal with you in Paris, if we will have an absolute exclusive on the Pierre Cardin cigarette lighters for the U.S. We must have an exclusive in order to go ahead with this deal."

By letter dated December 6, 1976, Duquesnoy advised Morse of the essential contract terms required by SARL:

> "I hereby give you the conditions we require to grant a license for the lighters PIERRE CARDIN:
>
> - duration of the contract: three years, that is to say from 1st January 1977 to 31st December 1979.
>
> - royalty-rate applicable on <u>turnovers</u> achieved, tax free:

10%.

- guaranteed minimum royalties:
U.S.$. 60.000 for the first year,
U.S.$. 70.000 for the second year,
U.S.$. 80.000 for the third year." (emphasis in original).

Enclosed with Duquesnoy's letter was a blank form SARL agreement in French, which Morse had translated to permit him to generally understand its terms.

Thereafter, in a February 28, 1977 letter to Duquesnoy, Morse requested certain terms in addition to those contained in the December 6 Duquesnoy letter.

> "My partners * * * all agree to your proposal to a guaranteed minimum for the first year of business for $60,000 royalty, the second year $70,000, and $80,000 for the third year. For this guaranteed royalty our requests as set forth to you today are as follows:
>
> 1 - That we are allowed to buy from more than one source.
> * * *
>
> 2 - Assignment of the Pierre

Cardin on cigarette lighters for exclusive use in the U.S. by us only. * * *

3 - Negotiations and contract in English so that we may know everything we are agreeing to.

4 - A renewal clause in a contract to permit us to exploit our investment over more than 3 years.

5 - Proposed new target date of responsibility to begin on July 1, 1977."

On March 10, 1977, Duquesnoy wrote Morse that Pierre Cardin/SARL agreed with the additional terms proposed by Morse.

"Mr. Pierre CARDIN agrees on the conditions you propose to us. For good order, I remind them to you hereunder:

- Minimum guaranteed royalties:
  U.S.$ 60.000 for the first year,
  U.S.$ 70.000 for the second year,
  U.S.$ 80.000 for the third year.

- royalty-rate: 10%

- Period: Three years

> To be renewed for three years if $1 million is reached, as turnover, at the end of third year of the first period.
>
> Please, find hereunder, the names and addresses of our [three] Japanese licensees you will be able to contact and get your supplies of lighters from them and them only.
>
> * * *
>
> As soon as you have contacted them and have actually organized this supplying, will you be kind enough to let me know about it, very quickly, so that I can ask to [sic] our lawyer in New York, to start the wording of our contract which will begin on 1st July, 1977." (emphasis supplied).

It could reasonably be concluded from Duquesnoy's agreement to the conditions in the February 28 letter of Morse that Duquesnoy/SARL intended to enter into a binding contract prior to executing a formal written agreement. The fact that Duquesnoy stated in his letter that a formal

contract would be prepared in New York did not unambiguously indicate that Duquesnoy did not intend to be bound before the execution of such a contract. Indeed, when read in conjunction with Duquesnoy's statement that "Mr. Pierre CARDIN agrees on the conditions you [Morse] propose" and Duquesnoy's request that Morse contact and place orders with SARL-approved suppliers ("organized this supplying") before the preparation of a formal contract, Duquesnoy's intent is, at best, unclear.

Upon receiving Duquesnoy's March 10 letter, Morse also believed he had entered into a contract and that a formal written agreement was not required since it would merely incorporate the contract terms contained in the correspondence. SARL had agreed to the "five points" he had proposed, including having a "contract in English" which consisted of the

correspondence between the parties, in particular the February 28 and March 10 letters. Thus, on March 14, 1977 Morse wrote Duquesnoy as follows:

> "Thank you for your letter of March 10th. We are pleased that you agree with our five points set forth in the letter of February 28th."

In addition, on March 14, 1977 Morse wrote two of the three Japanese suppliers approved by SARL in Duquesnoy's March 10, 1977 letter as follows:

> "We have presently been assigned the Pierre Carding [sic] name exclusively in the United States for cigarette lighters by Mr. Herve Duquesnoy and he gave us your name as being a licensee to manufacture Pierre Cardin cigarette lighters."

On March 24, 1977, Duquesnoy advised Morse that SARL could not grant him the cigarette lighter license "as it has been promised to our licensee of jewelry, SWANK."

Morse then commenced this action for, inter alia, breach of contract.

The trial of the action was bifurcated with respect to liability and damages. After the jury found that SARL had breached the license agreement, Morse established the amount of his damages principally through the expert testimony of George P. Dinnerman (a former National Sales Manager for Ronson and a Vice-President of Marketing for Ronson and Scripto) and a Report prepared by Mr. Dinnerman entitled "Sales And Net Profits Forecast (Units And Dollars) - Lighters With Pierre Cardin Trademark, Trade Name or Logo For Domestic U.S.A. Market".

The District Court found that, "[o]n the basis of his extensive familiarity with forecasting and sales of cigarette lighters, the Court was convinced, and remains convinced, that Dinnerman is a qualified expert on the subject [of

damages]". Petition, B36-37.

Based on this experience, Mr. Dinnerman projected that, over the 3 year period of the license agreement with SARL, Morse would have been able to sell 264,581 units of the 7 different models of "Pierre Cardin" lighters, and would have realized net profits before taxes of $1,736,580 based on such sales. These projections were based upon the following assumptions:

(1) "Pierre Cardin" as a prestigious designer's name would make the cigarette lighters which Morse was to sell a desirable and readily marketable gift or status product, especially since no other designer lighter had ever been marketed in the United States or competed with the "Pierre Cardin" lighter.

(2) In the 10 month period from October 1975 to July 1976, 23,000

"Pierre Cardin" lighters were sold in Canada based upon a telex received by Morse from a Japanese supplier.

(3) In making sales forecasts in the past, Mr. Dinnerman had relied upon the traditional one to ten (1:10) ratio between Canadian and United States sales of consumer items (i.e., if one particular consumer item were sold in Canada, 10 would be sold in the United States).

(4) In accordance with the 1:10 ratio and the fact that 23,000 "Pierre Cardin" lighters were sold in a 10 month period in Canada, Mr. Dinnerman calculated, for purposes of comparison that Morse should have been able to sell at least 240,000 "Pierre Cardin" lighters in a 10 month period in the United States, or 260,000 lighters in a 12 month period

- more than 4 times the number which Mr. Dinnerman conservatively projected Morse would sell in his first contract year.

(5) In a previous year, Morse had sold approximately 4,000 "Pierre Cardin" cigarette lighters to a very limited market consisting primarily of "duty free shops" in the United States.

(6) Based upon figures prepared by the U.S. Government entitled "U.S. Imports For Consuption TSUSA Commodity By Country Of Origin" and various audits, studies, surveys and other information prepared and collected by Mr. Dinnerman, sales of refillable lighters in the United States (like the "Pierre Cardin" lighters) began to increase in 1977 both by dollar and number of units.

(7) Based upon figures prepared by the U.S. Department of Commerce entitled "1977 Census of Retail Trade Report", there were approximately 200,000 different outlets to which Morse could sell "Pierre Cardin" lighters. Therefore, if Morse sold only 10 lighters each year in only 5% of the available outlets, he would have sold 100,000 units - 20,000 more than Mr. Dinnerman projected Morse would sell in his first contract year.

(8) The number of "Pierre Cardin" lighters which Morse would sell in the second and third contract years would increase by 8%, an extremely conservative increase since, for example, Swank's Fall 79/Spring 80 sales of "Pierre Cardin" lighters increased over its Fall 78/Spring 79 sales by 52%.

From the projected sales of cigarette lighters based on these assumptions, Mr. Dinnerman then subtracted the unit expenses, general overhead expenses and the royalties payable to SARL to calculate the net profits Morse would have realized had SARL not breached the agreement.

It is, therefore, clear that, as the District Court and Court of Appeals held, there was a rational foundation for the jury award of $435,000. Consequently, the award was neither speculative nor the product of "guesswork".

REASONS FOR DENYING THE WRIT

1. The Decision of The Court Of Appeals Was Correct

SARL maintains that a writ should be granted because the decision of the Court of Appeals:

(1) Established a "... precedent that would inhibit businessmen from memorializing points of negotiation in correspondence for fear of being found to have entered into a binding contract ..." Petition, 13.

(2) Permitted the damage award to be based on "speculation and guesswork". Petition, 19.

Each of these contentions is without merit. More importantly, even if meritorious, neither would warrant the granting of a writ for the purpose of reviewing the Court of Appeals decision.

Contrary to SARL's contention, it was not:

> "... undisputed that Cardin and Morse both contemplated that any licensing agreement reached between them would be embodied in a formal written contract" (Petition, 15),

and Morse and SARL had not:

> "... unambiguously communicated

> to each other that they would not consider themselves bound to a licensing agreement until a formal contract was negotiated, drafted and executed." Petition, 15.

Morse testified at trial that he believed he had entered into a contract upon receiving the March 10, 1977 letter from Duquesnoy. The March 10 letter, together with his February 28 letter, contained all the essential terms of the licensing agreement and constituted the "contract in English". A more formal written agreement was unnecessary because it would merely incorporate the terms set forth in the correspondence between him and Duquesnoy.

While Duquesnoy indicated in his March 10 letter that a formal contract would later be prepared, he also stated that:

> "Mr. Pierre CARDIN agrees on the conditions you propose to us",

and directed Morse to begin placing orders

with SARL-approved suppliers. Therefore, at best, the March 10 letter is ambiguous with respect to whether SARL intended not to be bound until the execution of a more formal agreement.

Under these circumstances, the law of New York is clear - whether parties intend to be bound before the execution of a formal written agreement presents a question of fact for the jury to determine unless the parties' intent is unambiguous.

> "Here the crucial question is whether the parties intended not to be bound, or whether either of them manifested an intent to the other not to be bound, until a fully integrated contract had been executed. * * * To be sure, the fact that the parties contemplated that an integrated memorial of their agreement would be executed is not conclusive of their intent not to be bound until after execution, Restatement of Contracts §26, but it does constitute some evidence thereof. Thus, ultimately the decision here depends upon an issue of fact." Banking & Trading Corporation v. Floete, 257 F.2d 765, 769 (2d Cir. 1958)

(emphasis supplied) (citations omitted).

"These letters pose a basic question as to what was the intent of the parties (Matter of Ahern v. South Buffalo Ry. Co., 303 N.Y. 545, 548, 104 N.E.2d 898, 90, affd. 344 U.S. 367, 73 S.Ct. 340, 97 L.Ed. 395). Where the intent of the parties is not unequivocally clear, we must glean intent from the sense in which words were used, the relation of the parties, the resolution of conflicting inferences, if any, and other surrounding circumstances. This inquiry involves both questions of law and fact (Kenyon v. Knights Templar & Masonic Mut. Aid Assn., 122 N.Y. 247, 254, 25 N.E. 299, 300), and is not properly dealt with by summary judgment. (See Lachs v. Fidelity & Casualty Company of New York, 306 N.Y. 357, 118 N.E.2d 555; Berg v. Auto Wheel Industries, 32 A.D.2d 876, 301 N.Y.S.2d 650)." Morton L. Ackerman, Inc. v. Mohawk Cabinet Company, Inc., 37 A.D.2d 655, 655, 322 N.Y.S.2d 396, 398 (3d Dept. 1971).

"Once two parties have reached agreement on the material terms of a contract, it may or may not become binding at that point depending solely on the intention of the parties. Professor Corbin has noted:

> One of the most common illustrations of preliminary negotiation that is totally inoperative is one where the parties consider the details of a proposed agreement, perhaps settling them one by one, with the understanding during this process that the agreement is to be embodied in a formal written document and that neither party is to be bound until he executes this document. Often it is a difficult question of fact whether the parties have this understanding; and there are very many decisions holding both ways. These decisions should not be regarded as conflicting, even though it may be hard to reconcile some of them on the facts that are reported to us in the appellate reports. It is a question of fact that the courts are deciding, not a question of law; and the facts of each case are numerous and not identical with those of any other case. In very many cases the question may properly be left to a jury. 1 Corbin §30.

See, Brasstell Mfg. Co. v. Mitsubishi International Corp., 21 Misc.2d 343, 192 N.Y.S.2d 200 (1959); Becker v. Peter A.

> Frasse & Co., Inc., 255 N.Y. 10, 173 N.E. 905 (1930).
>
> * * *
>
> However, as Professor Corbin suggests, the question of intent in this situation is uniquely one of fact." Babdo Sales, Inc. v. Miller-Wohl Company, Inc., 440 F.2d 962, 964 (2d Cir. 1971) (emphasis supplied).

See also ABC Trading Co., Ltd. v. Westinghouse Electric Supply Company, 382 F.Supp. 600, 601 and 602 (E.D.N.Y. 1974) ("Whether the parties intended to be bound without a formal writing is a question of fact," and "[i]n resolving the factual question concerning the understanding of the parties recourse may be had to the surrounding circumstances."); International Telemeter Corporation v. Teleprompter Corporation, 592 F.2d 49, 56 (2d Cir. 1979) ("whether or not the parties have manifested an intent to be bound must depend in each case on all the circumstances."); Brown Bros. Electrical Contractors, Inc. v. Beam Con-

struction Corp., 41 N.Y.2d 397, 400, 393 N.Y.S.2d 350, 352, 361 N.E.2d 999, 1002 (1977) ("'[W]hile it is the responsibility of the court to interpret written instruments' * * * where a finding of whether an intent to contract is dependent as well on other evidence from which differing inferences may be drawn, a question of fact arises * * *"); Hart v. Socony-Vacuum Oil Co., 291 N.Y. 13, 18, 50 N.E.2d 285, 287 (1943) ("While the construction of writings is, to be sure, matter of law in the sense that it is an affair for a judge, still the particulars of the process of ascertaining the disclosed intention of a writer are for the most part items of fact."); V'soske v. Barwick, 404 F.2d 495 (2d Cir. 1968), cert. denied, 394 U.S. 921 (1969); and Morris Run Coal Company, Inc. v. Carthage Pulp & Paper Co., Inc., 210 App.Div. 678, 206 N.Y.S. 676 (4th Dept.

1924), affd., 242 N.Y. 567, 152 N.E. 430 (1926).

Since the correspondence exchanged between Morse and Duquesnoy did not clearly indicate that they did not intend to be contractually bound until the execution of a formal written agreement, an ambiguity with respect to this issue existed. Accordingly, the District Court properly submitted this question to the jury and correctly refused to set aside the resulting verdict. The Court of appeals affirmance was similarly not in error.

Moreover, no new "precedent" has been established by this case. The District Court and Court of Appeals merely applied the well established law of New York that when an ambiguity exists, a jury must decide the factual issue of whether parties intend to be contractually bound prior to the execution of a formal written agreement.

Nor has this rule inhibited businessmen from memorializing their negotiations. A binding agreement will not be formed if, in contrast to the instant case, the parties clearly indicate that they do not intend to be bound until a formal agreement is executed. See, e.g., Brause v. Goldman, 10 A.D.2d 328, 330, 199 N.Y.S.2d 606, 609 (1st Dept. 1960), wherein the defendant's attorney unambiguously wrote, "... it being understood, of course, that neither this letter nor any discussions between us or between the principals or their attorneys, nor the exchange or preparation of any papers or memoranda will be deemed to constitute an agreement, until a formal written agreement has been duly executed and delivered."

SARL's second contention -- that the damage award was based on speculation and guesswork -- is likewise groundless. As

the District Court properly held:

> "It is well-established that lost profits are an appropriate element of damages for breach of contract where 'the loss of prospective profits are the direct and proximate result of the breach; profits were contemplated by the parties when they entered the contract; and there is a rational basis on which to calculate profits.' Perma Research & Dev. Co. v. Singer Co., 402 F.Supp. 881, 898 (S.D.N.Y.), aff'd, 542 F.2d 111 (2d Cir. 1975); cert. denied, 429 U.S. 987 (1976); Freund v. Washington Square Press, Inc., 34 N.Y.2d 379, 357 N.Y.S.2d 857 (1974). Of course, our confidence in the amount awarded for lost profits is greatest when the business involved has a track record or when the subject matter of the contract is actually put to its intended use by someone other than the plaintiff. E.g., Western Geophysical Co. v. Bolt Assoc., 584 F.2d 1164 (2d Cir. 1978) (licensor wrongfully abrogated license agreement and used the license to generate its own profits, which became strong evidence of the profits lost). But the lack of a complete track record is not fatal to a claim of lost profits. For Children, Inc. v. Graphics Int'l., Inc., 352 F.Supp. 1280 (S.D.N.Y. 1972). 'The whole matter is a question

of the evidence.' William Goldman Theatres v. Loew's, Inc., 69 F.Supp. 103, 105-6 (E.D. Pa. 1946), aff'd, 164 F.2d 1021 (3d Cir.), cert. denied, 334 U.S. 811 (1948). '[I]t will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.' Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931). 'Also, where there is a contract and the breach thereof causes harm to a plaintiff and the only difficulty is in measuring the harm, the law will not allow a defendant to escape liability merely because the fixing of damages is difficult or imprecise.' Lee v. Joseph E. Seagram & Sons, Inc., supra, 413 F.Supp. at 707. 'The wrongdoer should bear the risk of uncertainty that his own conduct has created.' Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556, 565 (2d Cir. 1970). The only restriction is that the 'jury may not render a verdict based on speculation or guesswork.' Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946); Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 909-10 (2d Cir.), cert. denied, 369 U.S. 865 (1962)." Petition, B31-34.

See also Contemporary Mission, Inc. v. Famous Music Corporation, 557 F.2d 918 (2d Cir. 1977); and Lee v. Joseph E. Seagram & Sons, Inc., 413 F.Supp. 693 (S.D.N.Y. 1976), affd., 552 F.2d 447 (2d Cir. 1977).

The damages awarded to Morse by the jury were based upon the expert testimony of a person with 20 years experience in marketing, selling and projecting the sales of cigarette lighters, and on a detailed Report prepared by him. The unsupported statement by SARL that the "[u]ncontroverted evidence at trial demonstrated that had plaintiff . . . commenced the venture for which he sought a contract, he would have suffered losses" (Petition, 19-20) is, therefore, baseless. It is simply an attempt to overcome the District Court's holding that SARL's purported "expert" was not qualified to testify as an expert witness. Petition, B44-45.

Even assuming, arguendo, that the telex which indicated the amount of "Pierre Cardin" cigarette lighter sales in Canada were hearsay (but see Fed. R. Evid. 803(24)), it was not improper for Mr. Dinnerman to rely on it in making his projections since the telex was a type of document which had been relied upon by Mr. Dinnerman in the past to make sales projections. Fed. R. Evid. 703.

Furthermore, Morse's damages were not "based on the unsupported assumption that U.S. sales of "Pierre Cardin" cigarette lighters would be ten times Canadian sales" (Petition, 9) (emphasis supplied). Mr. Dinnerman testified that, based upon his experience, the 1:10 ratio was an accurate projector.

Finally, although Morse had not begun selling the "Pierre Cardin" lighters pursuant to the contract (vis a vis to

duty free shops, supra) because SARL breached the contract before he could begin any substantial performance, an absence of prior sales does not preclude the recovery of damages for lost profits or render such an award speculative. For Children Inc. v. Graphics International, Inc. 352 F.Supp. 1280 (S.D.N.Y. 1972); and cases cited, supra.

2. No Special Or Important Reasons Exist For The Granting Of A Writ

As demonstrated above, the Court of Appeals decision was not in error. More importantly, however, even if an error existed, review by this Court would not be warranted.

This is a simple breach of contract action requiring the application of established principles of New York law with respect to contracts and damages. No novel

or important issue is presented and no issue of national or federal importance has been raised. The law which was correctly applied in this case is not in conflict with that of this Court or any other Circuit. Nor has there been a "departure from the accepted and usual course of judicial proceedings. . . as to call for an exercise of this Court's power of supervision". Accordingly, there are no grounds for granting a writ of certiorari. Supreme Court Rule 17.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that SARL's petition for a writ of certiorari should be denied.

Dated: June 30, 1982

Respectfully submitted,

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